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OCT 27 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 369

BETHLEHEM STEEL COMPANY,
Appellant,

vs.

ARTHUR J. MOORES

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

SAMUEL B. HOROVITZ,
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN,
Counsel for Appellee.

SCHNEIDER, REILLY & BEAN,
Of Counsel.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT, IN EQUITY

ARTHUR J. MOORES

vs.

BETHLEHEM STEEL COMPANY

STATEMENT IN OPPOSITION TO JURISDICTION

In accordance with Section 3 of Rule 12 of the rules of the Supreme Court of the United States, the plaintiff-appellee hereby submits his statement in opposition to the jurisdiction of the Supreme Court of the United States to entertain said appeal.

The Statutory Provision as to Mandatory Appeal Is Not Applicable

Title 28 United States Code, Section 1257 (Act of June 25, 1948, Public Law 773 (H. R. 3214), 80th Congress, Second Session) provides the only bases upon which appeal to the Supreme Court of the United States may be taken. That section reads in part:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It is solely in strict accordance with this section that an appeal may be taken, and when appeal is in accord with the provisions of the section, the same is mandatory and not discretionary with the Court. The purpose of the section is to restrict that mandate, *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651, and to make certain that the highest court of the state has been informed of the contention that a state statute is alleged to be invalid on federal grounds. See *Wilson* v. *Cook*, 327 U. S. 474, 480 and cases cited. "This jurisdictional requirement is satisfied only if the record shows that the question of the validity of the state statute, *as construed and applied* (italics added), has either been presented for decision to the highest court of the state ——— (omission added) or has in fact been decided by it, ——— (omission added) and that its decision was necessary to the judgment." *Wilson* v. *Cook, supra.*

On page 7 of its statement, the defendant-appellant states, as is true, that the record of the Superior Court of the Commonwealth of Massachusetts is limited to showing its decree. That decree was entered without benefit of assistance from the Supreme Judicial Court, which merely affirmed the decree by order of rescript. Furthermore, normal practice in this Commonwealth is that the record of the case is not sent to the Supreme Judicial Court, but only questions of law upon exception and appeal. When so brought, the litigation of the suit does not terminate until the exceptions or appeal are disposed of and the judgment of the court is remitted to the court below for the purpose of being carried into effect. *Bryan* v. *Bates*, 94 Mass. (12 Allen) 201, 205. See Mass. G. L. (Ter. Ed.) C. 211 Sec. 8. The judgment or affirmation of the same which is contained in an order or rescript of the Supreme Judicial Court to the Superior Court is always recorded only in the Superior Court. G. L. (Ter. Ed.) C. 212 Sec. 9. Thus, the Supreme Judicial Court, except in unusual circumstances, is not a

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court of record, and the record here discloses only normal practice. Therefore, the record of the highest court, the Superior Court, does not disclose that there was any question of the validity of a state statute involved, nor was there any dependency upon the Supreme Judicial Court for the entry of the original final decree.

It may here be noted that counsel for the appellant was apparently aware of the peculiarities of the judicial structure of the Commonwealth. The petition for appeal is addressed to the Supreme Court of the United States. It was not allowed by a member of that tribunal, which is error of itself. But by so addressing the petition, counsel avoided an even more difficult position, for its uncertainty caused it to have the appeal petition signed by both a judge of the Supreme Judicial Court and the Superior Court. It is clear that the difficulty arises from the fact that although the appeal must be from the final decree of the Superior Court, the only claimed error on the record must be in the Supreme Judicial Court. To have addressed the petition to the Superior Court would have immediately shown the paucity of the record; and to have addressed the petition to the Supreme Judicial Court would have been clearly erroneous.

In order to find any question, one must look at the opinion of the Supreme Judicial Court. A copy of that opinion is attached to the statement of the Bethlehem Steel Company as Exhibit "B". It is important to note that the opinion is not certified as a portion of the Superior Court record.

That opinion discloses no question concerning the validity of the Massachusetts Workmen's Compensation Act, Mass. G. L. (Ter. Ed.) C. 152, the only statute of the Commonwealth involved herein. The question presented is one of applicability of that Act to the facts in the case. It has never here been asserted nor does the record show that

Act to be repugnant to the Constitution of the United States.

> "As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States." *Wilson* v. *Cook, supra,* p. 481.

Therefore it is respectfully submitted that by the very nature of the court structure in the Commonwealth of Massachusetts there can be no appeal to the Supreme Court of the United States except under unusual circumstances not present here. Secondly, even if it be deemed that an appeal can be taken, there is nothing in the record allowing appeal in conformity with the requisite provisions of the appeal statute.

Conclusion

It is respectfully suggested that the appeal to this Court be dismissed for lack of jurisdiction.

By His Attorneys, SCHNEIDER, REILLY & BRAN,
SAMUEL B. HOROVITZ.

Of Counsel:
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT, IN EQUITY

ARTHUR J. MOORES

vs.

BETHLEHEM STEEL COMPANY

MOTION TO DISMISS APPEAL

Now comes the plaintiff in the above-entitled action and hereby moves to dismiss the appeal of the defendant-appellant, which appeal is addressed to the Supreme Court of the United States; and as cause for the said motion the plaintiff says that said Court is without jurisdiction to consider said appeal.

By His Attorneys, SCHNEIDER, REILLY & BEAN,
SAMUEL B. HOROVITZ.

Of Counsel:
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN.